No. 14,743

# United States
# COURT OF APPEALS
## for the Ninth Circuit

HERBERT SIMPSON,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

Appeal from the United States District Court for the District of Oregon

## APPELLANT'S REPLY BRIEF



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Appeal from the United States District Court for the District of Oregon

## APPELLANT'S REPLY BRIEF

### RESTATEMENT OF BASIC PRINCIPLES

The Government may not in two proceedings or by indirect means do that which it knows it may not do in one proceeding or by direct means. Thus it may not subpoena a witness before a grand jury to inquire about his alleged violation of the Smith Act and require him to answer identifying questions and, upon his refusal to answer them because such questions might tend to incriminate him, prosecute him for contempt and in the

contempt proceedings require him to produce identifying evidence against himself or for the want of it be adjudged guilty of contempt.

By the same token the same Government, should not be allowed to use similar proceedings through its legislative arm, i.e., a Congressional Committee, to ask identifying questions of one whom it claims is a Communist and, if, under the privilege of the Fifth Amendment, he refuses to give the identifying answers, prosecute and convict him of contempt unless he actually adduces identifying evidence linking him as the person the Government claims is a Communist.

Either the Committee knew the answers to the questions it propounded to appellant or it did not. If it knew the answers the inquiry could serve no purpose pertinent to whatever the subject of inquiry was. If it did not know the answers or had any doubts about them and the subject of inquiry was Communism and the Committee sought the identifying answers, the answers were privileged because those same identifying answers could supply a necessary link in a prosecution against appellant.

Moreover, even if it knew the answers and wanted corroborative sworn testimony of the witness, defendant was not lawfully bound to give identifying evidence to help make a link in the chain of a prospective prosecution. This is especially true if the Committee is allowed to become a "tribunal" as it is called by Appellee on page 15 of its brief, and conducts a trial instead of gathering information for legislative purposes.

## POINTS IN APPELLANT'S BRIEF NOT ANSWERED BY APPELLEE

Appellee fails in its brief to answer the argument and authorities set forth as a supplemental point under specification of error No. 24 at page 39 of appellant's brief. This is that the chairman of the committee failed to clearly and unqualifiedly overrule the claim of privilege under the Fifth Amendment and specifically direct appellant to answer the specific questions under the strict rule set down in the Emspak and Quinn cases and followed in the Fagerhaugh case. See also page 40 of appellant's brief. Nowhere in its brief is there any attempt to meet this fatal point by appellee. Therefore appellant reasserts his right to acquittal on that ground.

Appellee fails in its brief to show that it had made a prima facie case against appellant dehors the testimony of Robert L. Kunzig. Commencing at the bottom of page 40 of appellant's brief and into page 41, appellant cites testimony of Mr. Kunzig (Tr. of Proc. part 2, pages 61 and 62) showing his extensive education and legal experience. Yet we find on page 57 of the Transcript of Proceedings, Part 2, the following astounding admission on cross-examination:

> "Q. In Washington, D. C., is there a library that has the City Directory of Portland, Oregon, and the telephone books of Portland, Oregon?
> A. I don't know."

It is submitted that for want of any explanation or justification in the record for such colossal ignorance or evasion by the highly educated and experienced counsel

for the Committee and the Government's sole witness, all of Mr. Kunzig's testimony should be ignored and the case dismissed for want of a prima facie case.

However, even with Mr. Kunzig's testimony there are patent deficiencies from indictment to judgment of conviction and sentence.

**RE: APPELLEE'S ARGUMENT I, page 4 et seq.**

On page four of appellee's brief, it states that the indictment was legally sufficient. Under the headings of A and B it states that it is not necessary to either allege willfulness or to allege facts to negative possible defenses in the charge. When the writer went to law school he was impressed by a lecture given by one of his professors, a retired state supreme court justice, that sometimes the best reasoning may be had on a legal issue while sitting under the shade of a tree rather than delving into the detail of the law books.

Let us for the moment set aside the fact that the cases cited by appellee on page four under headings A and B do not actually support the propositions for which they contend; the import of the cases is that using the word unlawful necessarily includes the word willful in the indictment and therefore it is not necessary to allege willfulness. That is a far cry from the bare statement that it is unnecessary to allege willfulness.

An allegation of unlawful refusal to answer pertinent questions put by the committee through its subcommit-

tee may be too general, but at least it may be sufficiently inclusive of a valid charge. In 1954, not long before the hearings upon which appellant was convicted, Judge Louis Goodman of the Federal District Court in San Francisco was subpoenaed to appear before a Committee. He respectively declined the invitation, contending that the independence of the Judiciary under our Constitution justified his refusal to appear in response to such subpoena. Would appellee contend that Judge Goodman could be legally indicted for contempt on the bare allegation that he refused to appear or refused to testify? Certainly by applying just plain reasoning while sitting under the shade of a tree it should be clear to counsel for appellee that the refusal by Judge Goodman must have been "unlawful" or "without just, proper or legal cause" to create an indictable offense. There must be allegations substantially more than the refusal to appear or testify to make a crime. The number of justified or lawful reasons for refusing to answer questions are legion.

By the same token an allegation in an indictment that a defendant took property belonging to a third person would not state a crime. The owner may have authorized the defendant to take the property. The taking must be alleged to have been in some manner unlawful. An indictment that alleges that a defendant struck another person would not state a crime. The striking may have been in self-defense or it may have been in the course of a lawful boxing match.

The gist of a sufficient allegation of commission of a crime in an indictment is not merely in the first half of a valid indictment but in the second half which alleges directly and specifically the wrongful and/or unlawful phase of the act.

By the standard of simple justice and ordinary principles of law, the indictment in the instant case is insufficient to allege a crime in that it merely alleges the refusal to answer the questions propounded and fails to state either how or that such refusal was done unlawfully or willfully or worngfully or without just, proper or legal cause. The void in the indictment is basic, fundamental and fatal.

Appellant has thus far attempted to show by reason and principle that appellee's points A and B appearing on page four of its brief are not well taken. It is further submitted that none of the authorities cited by Appellee under A and B support or appear to support the proposition that an indictment so devoid of guts as this one is sufficient to withstand appellate court scrutiny.

In U. S. vs. Deutsch, the indictment alleged that the defendant "unlawfully refused". Appellant submits that a bare allegation of refusal without the "unlawful" should not and would not have been sustained.

In the case of Field vs. U. S., there was no statement of what the indictment contained and the court did not state that there need be no allegation of willful refusal or its equivalent. The court's opinion merely discusses what was meant by the word willful as used in the

statute. This case involved a failure to produce records, not a refusal to testify.

In Sinclair vs. U. S., the indictment did allege that the defendant refused "unlawfully". Certainly this case is no valid authority for the contention of Appellee, especially in view of the supreme court's holding that the allegation "unlawfully" is sufficient.

In Dennis vs. U. S. the defendant was indicted and convicted for "wilful failure to respond to a subpoena" . . . As the court states on page 988 "He was indicted and convicted for wilful default in answering a lawful subpoena."

In the Chapman case (1895) the indictment did allege that the defendant wilfully refused to answer. So stated the Court in Chapman vs. U. S., 5 Ct. App. D.C. 122 (1895), pages 125-126.

In the Eisler case the Court held that it was not necessary to negative a defense which on the record was not available to defendant. This is a far cry from Appellee's contention under B that this case is authority for the proposition that it is not necessary to allege facts to negative possible defenses. In respect to this case and in almost each and every one of the cases cited by Appellee in its brief careful reading of the cases discloses that they are not authority for the contentions made for them by Appellee.

Appellee then makes the following contention on the sufficiency of the indictment, on page 4 of its brief:

"C. It is not necessary to allege the evidentiary facts showing pertinence, but allegation of pertinence was in fact made by reference to the appropriate Congressional action establishing the Committee and its scope of investigation, together with the particular pertinent questions charged."

Firstly, appellant has never contended that the indictment must allege the evidentiary facts; appellant urges that there must be a sufficient allegation of what the question under investigation by Congress or the Committee was and, further, the indictment must contain a sufficient allegation that the questions put to the indictee sought answers and information which were pertinent to the question under investigation, and how they were pertinent.

In these respects the indictment was wholly deficient. It contains no allegation whatsoever of what the question was that the Committee was investigating or inquiring about. This is fatal to the indictment.

The indictment did say "and was asked questions which were pertinent to the question then under inquiry." Since there was no allegation at all stating what the "question then under inquiry" was, this bare statement is meaningless.

The statute, 2 U.S.C. Sec. 198, says "refuses to answer any question pertinent to the question under inquiry," and the indictment must therefore contain not only the "question under inquiry" but must show the relevance and pertinence of the questions to the question

under inquiry. The questions asked do not have an obvious relevance or pertinence to even the authorized functions of the Committee as set forth in the cited law and resolution as set forth on page 5 of Appellee's brief. See also House Resolution 5, which is exhibit 1. We therefore have a void upon a void in the indictment and it is doubly insufficient.

Moreover, a careful perusal of the indictment discloses that although the indictment does contain the above bare and insufficient statement that appellant "was asked questions which were pertinent to the question then under inquiry", it does not allege that the questions set forth in the indictment were "pertinent to the question under inquiry." This additional deficiency should not be treated lightly. The evidence in the case shows that Herbert Simpson was asked questions by the Committee other than those for which he was indicted. Perhaps those questions were pertinent to the undefined "question under inquiry". Perhaps an indictment for failure to answer them might be proper. But an indictment that fails to specifically and clearly allege that each of these particular questions was pertinent to the "question under inquiry" fails to set forth a valid indictment for this reason as well as the others.

Now let us consider the contention by Appellee that the citing of Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828), and H. Res. 5, 83d Congress, in the indictment, substitutes for the want of an allegation of the "question under inquiry" and thereby be-

comes an allegation of the "question under inquiry". The first answer to this contention is that it is invalid on its face. There is no pretense in the indictment that the first paragraph of the "Introduction" in the indictment was even intended to constitute an allegation of the question under inquiry. This subject would not be pursued any further except for the fact that on such contention and other untenable ones, appellant was convicted of a crime and sentenced to ten months in jail. Appellant therefore does pursue it further.

How does House Resolution 5 allege the question under inquiry? This resolution is the one that adopted the rules for the 83d Congress. These are XLII Rules with numerous sections and subsections and subsubsections, which were read by the clerk at the time the resolution was adopted until further reading was dispensed with by the Speaker of the House. A general reference to the rules of the House does not inform a defendant what the "question under inquiry" was on a specific date at a specific place by one of the Committees of the House. But after digging through the rules to rule XI of Powers and Duties of Committees and then coming to 17., Committee on Un-American Activities, what do we further find? We find that there are three wide areas of inquiry authorized, the third of which is "all other questions in relation thereto that would aid Congress in any necessary remedial legislation". It is clear, therefore, that the Committee was authorized to investigate or inquire about "questions" in the plural and not merely a question and that a reference to that specific subsubsection of a specific rule would not inform an

accused or any one else what the "question under inquiry" was.

As support for the contention that the citing of the Reorganization Act and House Resolution 5 substitutes for an allegation of what the question under inquiry was, counsel for Appellee cite Sinclair vs. U. S. Did the Court in that case really give any comfort to such contention of Appellee? Clearly not. The Government in that case set forth in considerable detail in the indictment the question under inquiry and the Court said on page 285: "By way of inducement the indictment set forth the circumstances leading up to the offense which in brief substance are as follows:". And then follows approximately 700 words of setting forth what was being investigated, which included the substance of the various resolutions authorizing the inquiry. Appellant asks the Court to consider this case as authority for the verity of Appellant's motion to dismiss the indictment.

Appellee states on page 6 of its brief that Congress can be presumed to act lawfully and, therefore, the indictment is sufficient. The Court said the following on page 296 in the Sinclair case:

> "Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained

> to some matter under investigation. . . . the proof on that point was ample."

In U. S. vs. Lamont and companion cases the Court did take into consideration the Reorganization Act in relation to the indictment for the simple reason that it appeared on the face of the indictment that the subject under inquiry was not within the purview of the authority of the Committee involved. The Court says:

> "There is no allegation in the indictments here linking the inquiry conducted by the subcommittee to the grant of authority dispensed to its parent committee."

The inadequacy of the indictment in the instant case is evident when we examine it in the light of the Lamont case where the Court states on page 2031:

> "As presented to us, the emphasis has been upon matters of criminal pleading and adequate notice; while these are involved, the issue goes beyond this to the very substance of whether or not any crime has been shown. This concentration upon procedure perhaps explains why in his generally able brief the prosecutor has failed to touch upon the crucial problem at the heart of the case. For the charges could not have survived had there been more formal and precise allegations of pertinency, since the governing legislation viewed in the light of the pertinent precedents demonstrates the lack of pertinency of the questions."

As previously pointed out, the question under inquiry in the instant case is not mentioned and it is impossible to ascertain whether the questions set forth in the indictment have any pertinency to the question under inquiry. Certainly there is no apparent pertinency in the indictment.

Under point D on page 4 of its brief Appellee cites the Josephson and Morford cases in support of the sufficiency of the indictment. In the Morford case the sufficiency of the indictment is not involved and neither the allegations in the indictment, nor their substance, are set forth in the opinion. In the Josephson case the defendant defaulted and therefore the pertinence of the questions asked in relation to the question under inquiry is not properly reached. Josephson's physical appearance at the hearing while refusing to be sworn but stating that he wouldn't answer any questions merely confirmed his default.

Under point E on page 4 of its brief Appellee cites two cases as authority for the sufficiency of the indictment. In the Townsend case the indictment reads in part:

> ". . . the said Francis C. Townsend unlawfully, knowingly and willfully and without leave, did absent himself from the presence of said Committee and from the room and place . . . where the said Committee was functioning . . . and thereby . . . unlawfully and willfully did make default."

This case is hardly authority for a contention that it is not necessary to allege "unlawfully" or "willfully" or both or that a default is the same as refusal to answer questions pertinent to the inquiry when there is no allegation of the subject of inquiry and nothing to indicate the pertinence of the question asked to the subject of inquiry.

The decision in Chapman v. U. S. is likewise not applicable. Here too there was no question involved as to whether or not "willful" or an equivalent term need be

used. "Willfully" was used in the indictment. See Chapman v. U. S., 5 Ct. App. D. C. 122 (1895) pages 125-6. Which states at pages 125-126 "Investigation was commenced, and according to the averments of the indictment . . . the appellant . . . each and all of said questions willfully refused to answer." The later decision cited by Appellee held that "refusal to answer necessarily implied willfulness in the legal sense" as distinguished from refusal in bad faith or with evil intent. In any attempt to construe that decision as holding that "wilful" or an equivalent need not be stated in the indictment, two things should be borne in mind. First, this seems to have been the first case under Section 192 to reach the Court; the later cases as cited in Appellant's Opening Brief hold otherwise. Second, any such holding would have been dictum in view of the fact that the indictment included the word "willfully".

In the argument two additional case are cited.

The Fields v. U. S. case is discussed elsewhere. Here it is sufficient to note that it is not pertinent. It did not discuss the question of whether "willful" or an equivalent word need be used in the indictment, but what was meant by the word "willful" as used in the statute (deliberate and intentional as distinguished from inadvertent or accidental).

In the Deutsch case the indictment alleged that the defendant "unlawfully refused."

**RE: APPELLEE'S ARGUMENT II, page 7 et seq.**

Under point A on page 7 of Appellee's brief appears the following: "Pertinence of questions was a matter for the court, with or without receiving evidence." It cites five cases in support of that point. First let us analyze the cases.

In two of them, the Chapman and Fields cases, pertinence, much less whether the Court should make a decision with or without evidence, were not issues in the cases. The respective courts simply did not hold or even reach the points set forth in Appellee's A.

The Josephson case was a default case and therefore the pertinence discussion may have been wholly immaterial in that case. The Court did say in that case, however:

> "The appearance and refusal of the appellant to testify before the subcommittee thus being shown, the jury had evidence from which it could find, as its verdict shows it did, that the appellant refused to answer any questions pertinent to the question under inquiry . . ."

Since, in fact, Josephson was in default for refusal to be sworn, he was not at any stage a witness who appeared in the legal sense and the dictum in any event stated that "the jury had evidence . . ."

The Morford case revolves around the issue of ambiguity of the indictment because the statute furnishes no standard by which a witness can determine whether a question is pertinent. The court did say in that case that pertinency is a matter of law for the Court to decide

and cited the Sinclair (a U. S. Supreme Court case) as its authority. In the Sinclair case the court said on page 296:

> ". . . it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation . . . the proof on that point was ample."

It is clear from the above that the Supreme Court did require the U. S. to both plead and show that the question pertained to some matter under investigation.

To make a criminal case against a witness, the statute specifically requires pertinence. There is no common law on this because under the common law there was no such crime for such refusal. Therefore, we must look to the statute and that is clear and specific, the question must be pertinent to a subject properly under inquiry by an authorized committee. As is stated in the Sinclair case, the pertinence must be both pleaded and proved. Moreover, there is no good reason for deviating from the Constitutional right to a jury trial on all the issues, including this one.

## RE: APPELLEE'S ARGUMENT III, page 8 et seq.

On page 8 of Appellee's brief, heading III, Appellee contends that privilege was improperly claimed. Its argument on this point to page 16 was, appellant believes, fully answered and overcome in appellant's opening brief but appellant is impelled to make further comment.

Appellee states on page 15 that the questions asked of appellant and which he refused to answer are innocuous. This confirms a similar contention in appellant's opening brief. Standing alone in the indictment, without the question under inquiry being pleaded, without alleging to what these questions were pertinent to a specific question under inquiry, these innocuous questions do not form a proper basis for criminal prosecution. The law and the Government, in their majesty, may not imprison people on whim, caprice or fancy. That is all we have in the indictment; no allegation of a wrongful, unlawful or willful refusal to answer pertinent questions on an alleged authorized subject or inquiry by our great Congress; just refusal to answer innocuous questions. The indictment cannot stand.

Put those same questions, however, in the environment of an accusation of Communism, along with Mr. Kunzig's testimony that one of the purposes of the Committee was to investigate Communism in the army and in education, etc. and we are no longer confined to an innocuous indictment but a justified fear of policemen, klieg lights and prosecution.

Appellee makes no distinction between the staged and threatening setting of the Committee questioning and the willingness of appellant to speak before the Court prior to sentencing. See Appellee's brief, pages 13 and 14. It is one thing to be told by a branch of the Government: We have statements under oath that you are a Communist, or perhaps something lesser, say a murderer, now tell us all about yourself and what you

know about Communism or that murder, starting not with Z but with A and then going through the whole gamut of your knowledge to Z. Tell this to us under oath while the cops are outside the door and while the radio carries your statements to whomever in your community might be interested in listening and while the newspaper reporters are preparing headlines for tonight's papers about you. If the Appellate Court can see no more distinction between the two situations any more than counsel for Appellee did when writing its brief, then counsel for Appellant lacks the words that could demonstrate the difference in fact and in principle.

On page 14 of its brief Appellee states that by "parroting numerous constitutional amendments" appellant "clearly shows . . . that he was opposed to the existence of the Committee and used this method to furstrate it." This is the gist of the fantastic and amazing gravamen of Appellee's brief, that if one swears by or relies upon our constitution, ipso facto one is contemptuous.

On page 11 of its brief Appellee states that "appellant, after stating his name, refused to answer any other of the identifying questions referred to in the indictment." Obviously, appellant could not have identified himself as a witness before that Committee without at the same time identifying himself as the Herbert Simpson who was named as a Communist and laying himself open to prosecution on account of his own words.

Did counsel for Appellee consider the fact that the decisions in the Emspak and Quinn cases had not been handed down by our Supreme Court when the Commit-

tee hearings were had in June, 1954, and that then the sentencing occurred in January, 1956, when those decisions were the law of the land? Do they realize that making the statement to the Court after the conviction was not to a Committee whose next question was sure to be "Are you the Herbert Simpson who was and or is a Communist?" Does the fact that he gave this information to the trial court in January, 1956 mean that he wasn't afraid to give it to the Committee in June, 1954?

On page 15 of its brief Appellee chides counsel for appellant for failure to adduce some evidence of the basis for the exercise of the privilege under the Fifth Amendment. Certainly counsel for appellant was not going to scout around and try to produce evidence against his client that Appellee did not already have and which could lay him open to prosecution. However, appellant did try to get the evidence that Appellee had against him for introduction in evidence but Appellee refused to produce it voluntarily and the court erred in failing to require it to produce it. However, cross examination of Mr. Kunzig did elicit some of the information that the Committee had, certainly more than sufficient to justify a refusal to answer the questions involved. Counsel for Appellee objected at the trial to appellant's adducing more of such evidence in objecting not only to some of the cross examination of Mr. Kunzig but to each of the questions put to Joseph Santoiana the F.B.I. Agent at Portland. The trial court, in error, sustained the objections.

Appellant will not permit to go unchallenged the

statement on page 14 of Appellee's brief that "Appellant took it upon himself to resist what he chooses to assert was a 'witch hunting' committee . . ." Appellant himself did not testify at the trial and, therefore, no such statement was made by him there. The testimony of appellant before the Committee appears as Government's Exhibit 5-A. Perusal of this exhibit discloses that he made no such assertion before the Committee. Appellant's affidavits in support of his motion for subpoena duces tecum and for inspection appear on pages 32 and 35 of the Transcript of Record and no such assertion appears in them. Appellant's statement to the Court preceding sentencing appears in the Transcript of Proceedings, Part 3, commencing on page 55, and he makes no such assertion there. These constitute all of the statements, sworn and unsworn, of appellant in the record.

Many of the finest citizens of our country, amongst them judges, leading teachers and scholars, have concluded and stated that this Committee is guilty of witch hunting and appellant might have been right if he had so said, but there is not a stitch of evidence that he did. Appellant might have been justified in at least thinking of the Committee as a witch-hunting Committee. There is a common saying to the effect that you can't hang a man for what he thinks. Is counsel for Appellee intimating that appellant ought to have said, or ought to have thought that the Committee was guilty of witch hunting and, reversing the tradition of the above mentioned common saying, hang appellant for what he ought to have said or at least ought to have thought?

Or did counsel for Appellee mistake as a statement of Appellee the quote of counsel for appellant from a book written by Robert K. Carr, political science professor at Dartmouth, which quote appears on page 58 of Transcript of Proceedings, Part 3, as follows:

> "As long as the Committee continues to exist, the most reactionary forces in American life are sworn to seek to control it, and to use it as an instrument of witch-hunting and suppression. They have succeeded in doing so in the past. Is there any reason to suppose they will never do so again?"

Counsel for Appellee may hang Mr. Carr for what he said and, if he wishes to go a step further, he may hang counsel for appellant for quoting Professor Carr but the witch hunt directed at appellant for accusing the Committee of witch-hunting would result in a hanging without an iota of evidence in the record.

## RE: APPELLEE'S ARGUMENT IV, page 16 et seq.

On page 22 of Appellee's brief appears the following misstatement:

> "The broad general demand for all reports, documents and records in possession of the Committee marks the motion for subpoena duces tecum as a fishing expedition and attempt to rummage through the Committee's file for purposes outside of the case."

First, what if the motion were in part a fishing expedition? The whole gamut of the Federal Rules of Civil Procedure, encourages and makes practical what counsel for Appellee calls "fishing expeditions." The

whole spirit and practical rules make such expeditions possible for the very purpose of ferreting out evidence that the other side has and which may be competent evidence. The name calling of "fishing expedition" should not throw shudders in the minds of an appellate Federal Court as it may at times in the minds of some State Courts.

That appellant's "fishing expedition" would have caught some pertinent evidence is clear from Mr. Kunzig's own testimony that the Committee had confidential evidence about Communist membership and activities of Herbert Simpson and appellant should have been given the opportunity to inspect and introduce into evidence all the evidence in the Committee's possession relating to the details of the Communist activities, etc., which would have constituted proof of the right to exercise the privilege under the Fifth Amendment to refuse to answer each of the questions propounded by the Committee.

This is what was requested by appellant as the motion and affidavits (Tr. of Rec. 31 to 37) show, and the statement of counsel for Appellee in their brief about "attempt to rummage through the Committee's file for purposes outside of the case" is truly without a scintilla of even color of foundation. Its falsity is patent and demand is made for Appellee to retract it.

The purpose of the motion was to prove one and more of the defenses that appellant had to the charges against him and it is quite evident from the affidavit of appellant and the testimony of Mr. Kunzig that the evi-

dence was available in the possession of the Committee to prove appellant's innocense of contempt. The sound discretion of the court should certainly have required the production of that evidence. And appellant does not rely only on the testimony of Mr. Kunzig, which came after the motion was denied. There is a presumption of truth to sworn statements and appellant's affidavits were not contradicted by Appellee. Appellee filed no counter-affidavits to the effect that it did not have the evidence appellant sought produced. Nor was any unsworn statement made to the Court to that effect. Appellee's counsel made no contention that the Committee did not have the introducable evidence appellant requested and needed for one and more of his defenses. The only real question before the Court was whether the evidence should be made available for appellant and sound discretion should have impelled the Court to require the production of available evidence so that justice could be done.

Appellee cites authorities to the effect that Rule 16 of the Federal Rules of Civil Procedure is not applicable. Appellant does not and did not contend that that rule applied but appellant does contend that Rule 17(c) and the case of Bowman Dairy Co. v. U. S., 341 U.S. 214, do apply. Appellant concedes that under that rule it is discretionary with the trial court, subject to abuse, and appellant urges that the trial court did abuse its discretion in not granting the right of subpoena duces tecum and inspection. Mr. Kunzig testified (Tr. of Proc. Part 2, page 24), ". . . we had information, confidential information, that Mr. Simpson was a member of the

Communist party. That was borne out by sworn public testimony . . . those two gentlemen both testified under oath that they knew . . . that the defendant here today, Mr. Simpson, had been . . . even on the State Central Committee of the Communist Party here in Oregon." Counsel for appellant had good cause to believe that the Committee did have in its possession such information and more—information that would convince the court that the Fifth Amendment privilege was rightly exercised. In denying appellant's motion the trial court in effect said, "I won't look at the documents you are trying to reach."

It was appropriate for the court to examine the documents requested itself and then do the judging of whether the information was relevant to appellant's defense and whether it could be disclosed to counsel for appellant. Since the trial court reserved to itself the issue of whether the privilege was properly exercised and did not intend to submit the matter to the jury and since the evidence sought to be produced was sought for that defense as well as the defense that the Committee knew all the answers to all the questions set forth in the indictment, the court clearly abused its discretion in refusing to grant appellant's request to examine the evidence and then judge. The trial court seemed so intent on the point that having the answers to the questions was not in its opinion justification for refusal to answer the questions, it failed to give any or adequate consideration to the other basic reason for appellant's need of the evidence that remained locked in the Committee's files, i.e., to justify

the claim of privilege. (See appellant's affidavit on page 36 of Transcript of Record.)

Most issues that have arisen on allowing a subpoena duces tecum in criminal cases, came about under sets of facts wherein the defendant sought to subpoena information or evidence in the possession of the prosecuting attorney. In the instant case the prosecuting attorney nor his superior had the evidence. Defendant was not seeking to elicit for perusal the cards that the prosecution was going to deal out against the defendant at the trial. The evidence defendant needed was in the possession of a legislative branch of the Government and lay dormant and useless to defendant unless the court in the exercise of sound discretion required the production of the evidence face up so that the appellate court, if not the trial court, could see the documents that could prove defendant not guilty of the crime charged. It must be clear that Rule 17 (c) exists for just such a purpose and the refusal to grant appellant the basic right under it was reversible error.

On page 33 of its brief Appellee cites U. S. vs. Bryan and Emspak v. U. S., D.C. Cir. 1952, 203 F. 2d 54, to show that the validity of the subcommittee need not be proved since its validity was not questioned at the hearing. The Bryan case involved the refusal to produce records and related to the existence of a quorum. The Emspak decision was reversed in the Supreme Court, as Appellee itself stated, and the Supreme Court could have but did not affirm the validity of the subcommittee and could have but did not deny the defendant the right to question its validity.

For further enlightenment we cite the District Court opinion in the Lamont case appearing in 18 F.R.D. 27, D.C. S.D. N.Y. The Circuit Court of Appeals, in affirming the District Court refers to Judge Edward Weinfeld's "scholarly opinion," although the appellate court did not find it necessary to consider all of the points covered by Judge Weinfeld.

One of the statements by Judge Weinfeld was that the indictment failed to plead (as does the instant indictment)

> "that the Committee before which the alleged refusal to answer occurred was duly empowered by either House of Congress to conduct the particular inquiry, setting forth the source of this authority."

And at page 36:

> "Here the authority of the Committee to act is seriously challenged. The challenge finds support in the failure of the very statutes and resolutions referred to in the indictment to disclose that any power to conduct the particular inquiry was ever delegated to it."

On principle the prosecution should allege in the indictment and prove at the trial by competent evidence the basic contention that a validly constituted subcommittee, acting under authority granted it by the Congress, under an act of Congress, conducted a lawful hearing. If the defendant found out later that the Committee was a Kangaroo Committee and had no lawful existence and therefore had no right to invade defendant's privacy, why should defendant's earlier ignorance or retisence make legal that which was not so?

On pages 34 and 35 of its brief Appellee cites a number of cases and other authorities on its contention that the best evidence rule did not apply to Mr. Kunzig's oral testimony of what he observed Congress or the Committee do. Reading of the cases cited discloses that those decisions have no resemblance to the point here involved. The following citations, however, do.

House Resolution 5

Rules adopted for the 83d Congress

Rule XLII:

"General Provisions

"The rules of parliamentary practice comprised in Jefferson's Manual and the provisions of the Legislative Reorganization act of 1946, as amended, shall govern the house in all cases to which they are applicable, and in which they are not inconsistent with the standing rules and orders of the house and the joint rules of the Senate and House of Representatives."

Rules XI:

"Powers and Duties of Committees

"25 (a) The rules of the House are hereby made the rules of its standing committees so far as applicable, except that a motion to recess from day to day is hereby made a motion of high privilege in said committees.

"(b) Each committee shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded."

Public Law 601 (Legislative Reorganization Act of 1946), page 831, Sec. 133 (b):

"Each such committee shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded."

20 Am. Jur. 377, Sec. 421:

"The commission of a public officer is the best evidence of his appointment and authority."

20 Am. Jur. 375, Sec. 418:

"Public records and documents of a public character are subject to the operation of the best evidence rule; and where the contents of such records or documents are material to an inquiry, the records or documents, or, in proper cases, certified copies thereof, should be produced."

32 C.J.S. 737, Sec. 808:

"The rule that the record is the best evidence has been applied to . . the record of proceedings of a legislative body."

IX Wigmore, Sec. 2427, page 24:

"Where by law an act is required to be done in writing, i.e., is ineffective unless so done, the writing is of course the only permissible subject of proof."

It was prejudicial error for the Court to accept for itself and to permit the jury to receive the oral testimony of Mr. Kunzig on the acts of Congress or its Committees.

## RE: APPELLEE'S CONCLUSION, page 42

Here Appellee equates the instant case with the Josephson case, admitting however that Josephson refused to be sworn. The difference between the two cases is major. The one comes under the default clause and pertinence is not properly reached; the instant case is decidedly different. Appellant did respond to the subpoena, he did appear, he was sworn, he did give his name and he did listen to specific questions and give specific reasons for not answering such questions and he did answer such questions as he thought safe and proper. The language of the decision in the Josephson case should be confined to the facts of that case.

## SUMMARY

In concluding appellant's plea for acquittal may we but quote from Bowers vs. U. S., on page 452:

> "It will not do to say that the questions were preliminary in nature and had they been answered, would have led to and been followed by questions plainly pertinent, for on that theory pertinency need never be shown in a prosecution under the statute. It could always be said the questions were preliminary. The indictment charged the seven questions were themselves pertinent."

And from the words of Chief Justice Warren in Quin vs. U. S., on pages 672, 673 and 674:

> "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to

an area in which Congress is forbidden to legislate. Similarly the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and Judiciary."

"Coequally with our other constitutional guarantees, the self incrimination clause 'must be accorded liberal construction in favor of the right it was intended to secure.' "

"Clearly not every refusal to answer a question propounded by a Congressional Committee subjects a witness to prosecution under Sec. 192."

Respectfully submitted,

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